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No. 768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ASSOCIATION OF AMERICAN RAILROADS, ET. AL.,
Appellees.

On Appeal from the United States District Court for the District of Delaware

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, Appellants respectfully submit their Brief in opposition to the Motions to Affirm filed: (a) jointly in behalf of the United States of America and the Interstate Commerce Commission, herein "The Government's Motion" or "G.M."; and (b) jointly in behalf of Appellee railroad and motor carrier companies and associations, herein "the Rail Motion" or "R.M." By Order of Mr. Justice Brennan, dated March 3, 1963, the date for filing this Reply was postponed at Appellants' request to March 25, 1963.

THE QUESTION INVOLVED IS SUBSTANTIAL

The question here involved is whether motor carriers transporting "frozen vegetables" under Section 7 of the Transportation Act of 1958 may only transport those vegetables cooked to, but not beyond, the point necessary to inactivate enzymes. It is that test upon which the District Court and the Commission would make such rights depend. This issue is novel and of great importance to motor carriers and processors of frozen vegetables. Appellees do not show that the issue is insubstantial or governed by past decisions of this Court.

The Rail Motor [illegible] that the substantial majority of the 500 "grandfather" motor carrier [illegible] for Appellees, the Regular Common Carrier Conference of the American Trucking Associations, Inc., which supports the decisions below. Appellants [illegible]. No doubt these are carriers whose interest in protecting their certificated operations outweighs their interest in preserving their "grandfather" rights, but there is no evidence that they constitute a majority of these protesting "grandfather" applicants. In the proceedings before The Commission, 19 packers, 20 motor carriers and 8 packer associations supported the petition. J.S. 2-3. One of Appellee Conference's largest members, Pacific Intermountain Express Co., J.S. 34-35, [illegible] introduced evidence. Exh. 1; Tr. 249-62) to support the position now taken by Appellants. Further, since the filing of the appeal herein, Appellants have been advised of personal concern for adverse effects from the decisions below, by 20 motor carriers and processors, as follows: Thompson Central County Canning Corporation, Consumers Packing Company, Dreyer's Frozen Products, Inc., Idaho Potato Growers, Inc., Idaho Potato Processors, Inc., Lamb-Weston, Inc., Ore-Ida Foods, Inc., J. R. Simplot Company, Shoreland Freezers, Inc., Southern Frozen Foods, Inc., Stilwell Frozen Foods, Inc., and Tropic Frozen Foods Corp. (motor carriers), Bellevy Transport Bonanza, Inc., Brown & Old Company, H. C. Duffy Produce, Frigid Food Express, Inc., Jenkins Truck Line, Krublin Refrigerated Xpress, Inc., Northern Fisheries Transportation, R & S Brokerage Co., Red Trucking Co., Refrigerated Trailers, Inc., Refrigerated Truck Lines, Sackville Mills Co., Skagit Valley Trucking Co., Inc., Transamerican Freight Lines, Inc., Willis Shaw Frozen Express, Inc., and Yoder Transfer Company.

1. Appellees do not question the validity of Appellants' claim (J.S., 10-12) that depriving "grandfather" motor carriers of the right to transport frozen vegetables cooked beyond the enzyme inactivation point will destroy their service and vitally affect processors served by them. The Rail Motion (18-9) suggests that such results are immaterial, quoting from the District Court's opinion which (J.S., 28) considered them to be "caused by the Act of Congress itself . . . ." It is difficult to believe that such results are either immaterial or caused by a statute designed to permit continued service by "grandfather" motor carriers without hindering or hampering processors of frozen vegetables "in any way." (J.S., 11-12, note 22). Liberal, not strained, construction is a matter of equity for "grandfather" statutes. Atomizing the articles encompassed requires reading the term "frozen vegetables" in Section 7 (a) of The Transportation Act of 1958 as "fresh frozen vegetables", ignoring the legislative purposes, and disregarding all practical consequences.

2. The District Court rejected the strained construction of the statute urged by Appellees because it regarded as necessary (J.S., 26-27) the harmonizing of Administrative Ruling No. 107 with the statutory languages. Such harmonizing was unnecessary, however, because (J.S., 13-15): (1) Administrative Ruling No. 107 had no standing before or apart from enactment of Section 7 of the 1958 Act; (2) the terms of Section 7 do not suggest or require such harmonizing, the second proviso of Section 7 (a) employing the term "frozen vegetables", not "fresh frozen vegetables" as Appellees and the District Court read it; and (3) the Commission's decision (J.S., 31-41) does not even mention Ruling 107 or suggest the need for harmonizing it with anything.

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, at 488 (1942).

Appellees argue (G.M., 9-11; R.M., 4-10) that prior decisions, including a *per curiam* affirmance by this Court, require distinguishing the first and second provisos of Section 7(a) of the 1958 Act, according "grandfather" rights only respecting those covered by the second, not the first, proviso. The cases cited by Appellees did not involve articles falling within any of the commodity descriptions in the second proviso and were properly distinguished by the District Court (J.S., 24-25).

The District Court in its opinion and thereafter made it plain that it regarded the issues involved as novel and difficult.

3. Even if the District Court was correct in assuming that Ruling 107 and the statutory language require harmonizing, the question remains whether the enzyme inactivation test is appropriate. It can hardly be doubted that the Commission itself conceived of it in these proceedings as a means of distinguishing the particular

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At the oral argument held December 5, 1962, before the three-judge District Court on Appellee's motion for an injunction pending appeal (thereafter granted), Chief Judge John Biggs, Jr., of the Circuit Court of Appeals, Third Circuit, stated in connection with the opposing argument of Appellees (Transcript 27-28):

> "But getting precise and leave out that question, here is an original question which, frankly, I for one had a great deal of difficulty with. I think we decided the case correctly, but that is a mere thought.
>
> "You have a review before the highest tribunal, which I think unquestionably would have to dispose of it on argument, and I can't answer that, of course. That would seem to me to constitute somewhat of a special circumstance under the case in point.
>
> "Don't you consider that to be of somewhat an unusual situation?
>
> "Generally in these three-judge cases that involve the Interstate Commerce Commission, without a dissenting opinion, it is fairly clear. But in this case, though, you are perfectly positive on your side, and your side is perfectly positive we are correct. I personally feel some doubts on this subject."

frozen vegetables involved from those specifically held by courts to be unmanufactured agricultural commodities. Prior to reversal by judicial interpretation, the Commission considered *all* frozen vegetables to be manufactured products.[1] Following the *Home Transfer*[2] and *Frozen Food*[3] decisions, the Commission explicitly refused to find the exemption applicable to any but the specific vegetables involved in those cases.[4] Here the "*Status* case," J.S. 31-44[5], the enzyme inactivation test was adopted for the first time as a rationalization for limiting the scope.

[1] *Ex parte Determination of Exempted Commodities*, 52 M.C.C. 511, at 534 (1951).

[2] *Home Transfer & Storage Company v. United States et al.*, 141 F. Supp. 599 (W.D. Wash., 1956), aff'd *per curiam* 352 U.S. 884 (1956).

[3] *Frozen Food Express v. United States et al.*, 148 F. Supp. 396 (S.D. Tex., Houston Div'n, 1956), aff'd *per curiam* 355 U.S. 86 (1957).

[4] *Hughes Extension—Frozen Foods*, 71 M.C.C. 457 (1957); *Motor West Coast Transport, Inc., Extension—Montana*, 71 M.C.C. 1 (1957).

[5] "In this connection Commissioner Webb, in a concurring opinion issued last month, stated: *Refrigerated Food Express, Inc., Extension—Aroostook County, Maine*, No. MC-113843 (Sub No. 40) (not yet printed, mimeo pages 15, 16): 'Our predecessors, who granted the authority in question to applicant's predecessor, thought that frozen french fried potatoes were frozen vegetables. For many years our Bureau of Motor Carriers has informally advised carriers who hold authority to transport frozen vegetables that they lawfully may carry frozen potato items. Prior to the report in the *Status* case, decided September 28, 1959, the Commission had never drawn any distinction between vegetables based upon the extent of cooking prior to freezing. Even in the *Status* case, the frozen potato items which were held to be beyond the purview of Section 7 of the Transportation Act of 1958 were described, nevertheless, as "frozen vegetables." 81 M.C.C. at 656."

"It is unfair, in my opinion, to attribute to former Commissioners an error committed by the present Commission. Our predecessors believed that *all* frozen vegetables were non-exempt. They granted authority to transport 'frozen vegetables.' To avoid atomization of the grants, they generally refrained from limiting such

The Government's Motion argues (8-9) and the District Court agreed (J.S., 26-28) that the enzyme inactivation test is in accord with the *Home Transfer* decision. That decision concerned frozen vegetables described, in part, as heated (J.S., 26-27) "sufficiently to kill the enzymes . . . ." The decision neither held nor suggested that further heating would alter the status of a vegetable. Nevertheless, the Commission (J.S., 38-41), the District Court (J.S., 26-28) and Appellees have seized that point as a status determinant. Nothing magical occurs at the enzyme inactivation point; indeed, it is only through chemical analysis that the enzyme inactivation point may be determined. The assertion (J.S., 39) that cooking beyond the enzyme inactivation point causes a "change in texture as it comes from the field" is nothing more than adaptation of the "natural state theory" rejected by this Court. Thus, the enzyme inactivation test is neither the same as, nor a proper substitute for, the "continuing substantial identity" test enunciated by this Court in the *East Texas* case. It is simply an improper means for distinguishing frozen vegetables and restricting the scope of "grandfather" rights under the 1958 Act.

4. The Commission did not, as the Government's Motion suggests (6-8), properly apply the "continuing substantial identity" test. The technical evidence received did not, as argued, relate for the most part to french fried potatoes. The evidence concerned all forms of

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qualifying phrases as 'cooked,' 'uncooked,' 'partially cooked,' 'processed,' etc. In any event, they can hardly be blamed for failing to anticipate that the Supreme Court would hold certain frozen vegetables to be exempt from regulation, that the Congress would roll-back the judicially declared exemption, and that the Commission would then, for the first time, draw a distinction between frozen vegetables based upon the extent of cooking prior to freezing."

East Texas Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, at 52-54 (1956).

vegetables, showing that they are processed similar
often in the same facilities. Particularly involved w
the frozen forms in which potatoes, onions, and spi
are marketed and the batch-packed forms in which ot
types of frozen vegetables are marketed. The Commis
explicitly employed three criteria (J.S., 38-41), two
which the District Court opinion (J.S., 29-30) found
applicable. No witness, whether favoring or opposing
position here taken by Appellants, suggested that
frozen vegetables here involved were distinguishable
any material respect from those conceded to have b
exempt prior to the 1958 Act. Aside from the enz
inactivation test the District Court opinion gives no ev
ence to any other ground in the Commission's decision;
plenary consideration of the merits would disclose no

5. The Government's Motion first concedes (6, n
"grandfather" rights accrued if the involved frozen ve
tables were exempt prior to the 1958 Act; later
however, it argues that no "grandfather" rights accr
even if they had been exempt. Appellants respectfu
submit that under proper interpretation the involv
frozen vegetables were exempt prior to the 1958 Act
were within the "grandfather" rights created thereun
This Court has not previously disposed of the issues. T
case affords the Court an opportunity to determine
proper interpretation of Section 7 of the Transportat
Act of 1958, including the circumstances and standa
under which a determination is required of the p
status of articles affected thereby.

Section 7 of the Transportation Act of 1958 was
acted to provide certainty, not confusion, and to ha
additional items under regulations in a manner wh
would protect "grandfather" motors carriers of fro
vegetables and not hinder or hamper processors in
way. The granting of Appellees' Motions would p

[1] The citations offered in the Government's Motion do not
do not support the statement therein that no "grandfather" r

pefuate confusion, necessitating pre-1958 status determinations of additional frozen vegetables while seriously harming "grandfather" motor carriers and the processors they serve.

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were conferred because the involved frozen vegetables were not exempt prior to the 1958 Act. Indeed, witness after witness before the congressional committees (and committee members) expressed uncertainty as to the scope of the exemption. E.g., *Hearings on H.R. 5823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., pp. 159, 163, 340-41.

To suggest (G.M., 10-11) that Congress sought to limit the exemption is immaterial. Insofar as frozen vegetables are concerned Congress eliminated the exemption, protecting existing carriers and processors with "grandfather" rights for *all* frozen vegetables.

[11] The District Court (J.S., 29-30) limited its approval here to the specific frozen vegetables covered by the Commission's findings. Additional frozen vegetables were involved in *Ballentine Produce, Inc. v. United States*, 205 F. Supp. 679 (W.D. Ark. Ft. Smith Div'n. 1962), but the District Court there found the Commission's orders not reviewable. (J.S., 7-8, note 12). The Commission's decision in the *Hughes* case, *supra* (note 7) is not final even at this date, the proceeding having been reopened, consolidated with another and reheard. On September 20, 1960 the United States District Court for the Eastern District of Pennsylvania, in C.A. 28304, *Hughes v. United States et al.*, enjoined the Commission against enforcing its orders therein (covering, *inter alia*, the handling of frozen french fried potatoes and many other types of frozen vegetables) and stayed the court case pending final action in the proceedings before the Commission.

CONCLUSION

It is respectfully requested that Appellees' Motions to Affirm be denied and that plenary consideration of the issues be afforded.

Respectfully submitted,

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